

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BILLY WARDELL

Claimant

VS.

GENERAL MOTORS CORPORATION

Self-Insured Respondent

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Docket No. 1,040,310

ORDER

Both parties appealed the May 17, 2012, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.¹ The Workers Compensation Board heard oral argument on September 11, 2012. E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of former Board Member David A. Shufelt.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Carla Fields Johnson of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument the parties stipulated that claimant's August 30, 2011, deposition testimony was not part of the record in this matter.

ISSUES

In his Application for Hearing, claimant alleged that on or about October 1, 2007 and each and every day worked thereafter to and including March 5, 2008, and thereafter, he sustained spinal injuries and left-sided radiculopathy as a result of repetitive bending,

¹ Both parties filed applications for review on June 4, 2012, but both of the applications contained the wrong docket number. Respondent filed an amended application for review on June 4, 2012, with the correct docket number. Claimant did so on June 5, 2012, after the date to appeal had expired. Nevertheless, as respondent's appeal was timely, the Board will consider all the issues raised by both parties.

lifting, stooping and twisting. Drs. Edward J. Prostic and Alexander S. Bailey examined claimant and initially opined claimant's low back injuries were work related and that claimant had a 10% whole body functional impairment. The opinion concerning functional impairment was based on the fact that MRIs conducted after claimant's work-related accidents revealed claimant had a herniated disc. A 2004 MRI and other medical records were then discovered indicating claimant previously sustained a herniated disc in a 2003 wrestling incident. Both doctors then changed their opinions. Dr. Bailey opined claimant's 10% functional impairment preexisted his work accidents and claimant's work accidents did not increase the functional impairment. Dr. Prostic opined claimant has a 10% functional impairment with 0 to 5% preexisting and 5% the result of his work accidents.

In his May 17, 2012, Award, ALJ Hursh found, "[a] slim preponderance of the evidence showed the claimant injured his low back from the October 1, 2007 and March 5, 2008 work events."² The ALJ found claimant had a 5% whole body functional impairment as a result of work injuries through March 5, 2008, and had a preexisting 5% functional impairment. With regard to work disability, ALJ Hursh found:

It is held the claimant's work disability was 50% from June 28, 2008 to February 28, 2011, averaging 100% wage loss with 0% task loss. It is held the claimant's work disability was 29% after February 28, 2011, averaging 58% wage loss and 0% task loss. K.S.A. 44-501(c) provides a credit for pre-existing functional impairment. Applying credit for the claimant's preexisting 5% functional impairment, the work disability percentages lower to 45% and 24%, respectively.³

Respondent contends ALJ Hursh erred in finding that (1) claimant sustained an injury arising out of and in the course of employment and (2) claimant is entitled to any functional impairment or work disability. Respondent requests the Board reverse the ALJ's Award and deny claimant's request for compensation. With regard to task loss, respondent submits the ALJ correctly determined claimant has a 0% task loss.

Claimant contends the evidence is uncontradicted that he sustained personal injury by accident arising out of and in the course of his employment and requests the Board affirm that finding by the ALJ. Claimant maintains he sustained a whole body functional impairment as the result of his work accidents, a 58% task loss, and that he sustained a 79% work disability until February 28, 2011, when it reduced to 58%. Therefore, claimant requests the Board modify the Award with respect to the percentage of work disability.

Claimant's amended application for review and brief to the Board did not assert he was entitled to any temporary total disability payments or contest the ALJ's finding that

² ALJ Award (May 17, 2012) at 4.

³ *Id.*, at 5.

respondent was entitled to a 5% credit pursuant to K.S.A. 2007 Supp. 44-501(c). Nor did claimant raise as an issue reimbursement of medical bills.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injuries as the result of October 1, 2007, and March 5, 2008, accidents arising out of and in the course of his employment with respondent? In the alternative, did claimant sustain personal injuries arising out of and in the course of his employment with respondent that resulted from a series of repetitive work-related accidents from October 1, 2007, through March 5, 2008, and thereafter?

2. If claimant sustained personal injuries by accident arising out of and in the course of his employment with respondent, what is the nature and extent of his disability from each accident?

a. What is claimant's permanent functional impairment as a result of his work-related injuries from the two accidents?

b. What is claimant's work disability from the two accidents? Specifically, what are his wage and task losses?

c. Is respondent entitled to a 5% credit pursuant to K.S.A. 2007 Supp. 44-501(c)?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

At the regular hearing, ALJ Hursh indicated claimant was asserting a repetitive injury with an accident date of March 5, 2008. Claimant did not request temporary total disability benefits or that respondent pay any medical expenses.

Claimant's job was to remove exterior car parts, weighing 10 to 50 pounds, from a conveyor and place the parts on a rack. He did this his entire eight-hour shift. On October 1, 2007, claimant was lifting doors off the conveyor, twisted and felt pain in his back. He immediately reported the incident to his supervisor, who informed claimant to go to plant medical, which is inside the plant. Personnel in plant medical advised claimant to see his personal physician.

On November 12, 2007, claimant went to see his own physician, Dr. Van T. Tran, who prescribed Vicodin, ordered an MRI, and scheduled claimant for physical therapy. Dr. Tran's notes from that visit indicated claimant injured his back four to five years earlier. Dr. Tran took claimant off work. Prior to seeing Dr. Tran, claimant had been performing

his regular job duties. The MRI, which took place on November 13, 2007, revealed annular bulging and a left foraminal/lateral disc protrusion at L5-S1 with neural compression. Dr. Tran's bill was paid by claimant's personal health insurance company.

Dr. Tran allowed claimant to return to work on January 7, 2008, without restrictions and claimant returned to his job performing the same work duties. Claimant was not asked if he experienced any symptoms or pain after he returned to work. However, Dr. Tran's records indicated that on February 7, 2008, claimant requested a prescription because of back pain.

On March 5, 2008, claimant was trying to grab a door before it fell, and upon grabbing it, lost his balance and twisted. That activity caused him to have pain in the middle part of his lower back which radiated into the back of his left leg. Claimant immediately notified his supervisor and testified he was sent to plant medical, who again told claimant to see his personal physician. According to claimant, after March 5, 2008, he performed his regular work duties to the best of his ability.

Dr. Tran's records indicate that on March 10, 2008, his office received a call from claimant complaining of back pain. Dr. Tran's records also contain notes from a visit with claimant wherein claimant reported going to medical at work for back pain and being given a cold pack. The notes from that visit indicated claimant was taking Vicodin and that claimant had been referred to a neurosurgeon, Dr. Hess. Due to the poor quality of the photocopy, the date on the notes is not ascertainable. Claimant walked into Dr. Tran's office on April 29, 2008. The notes from that incident indicated Dr. Hess would not see claimant because a workers compensation claim was involved. Claimant was advised to contact his supervisor and have him send claimant to a company doctor.

Claimant testified that on May 1, 2008, he returned to plant medical. The records from respondent's medical department indicated claimant was referred to North Kansas City Hospital Occupational Medicine (NKCHOM) where he saw Dr. Philip Ryan. That visit also took place on May 1, 2008. The notes from that visit indicated claimant injured himself while loading doors. Claimant testified that he received two epidural injections.

Respondent's plant medical records indicated that on May 7, 2008, Dr. Donald Knepper referred claimant to Medical Imaging. Claimant underwent an MRI of his low back at Medical Imaging on May 12, 2008. At L5-S1, the MRI showed a left paracentral/foraminal irregular protrusion, effacement of the descending left S1 nerve root as well as a moderate to severe degree of left foraminal stenosis, associated mild facet arthrosis and capsulosisynovitis, and mild right foraminal stenosis.

Sometime after May 1, 2008, claimant reported to his supervisor about taking Vicodin. Claimant would report to work every day, but was not allowed to work by his supervisor because of taking Vicodin. On June 28, 2008, claimant was terminated for

absenteeism. Claimant testified the absenteeism was caused by his supervisor sending him home because of the Vicodin prescription.

There is nothing in the medical records indicating the date claimant reached maximum medical improvement.

On February 28, 2011, claimant obtained employment in Illinois. He makes \$14.50 per hour and works 40 hours a week. Sometimes he works one hour a week of overtime. ALJ Hursh found claimant had a post-injury average weekly wage of \$601.75 since February 28, 2011. Since moving to Illinois, claimant has received physical therapy and epidural shots in his back.

At the request of his attorney, on October 14, 2011, claimant saw Dr. Edward J. Prostic, a board-certified orthopedic surgeon. Dr. Prostic testified that he reviewed claimant's medical records, took a history from claimant and conducted a physical examination. Claimant told Dr. Prostic of sustaining a back injury at work on October 1, 2007, while moving doors and each and every working day thereafter. Claimant's back condition worsened on March 5, 2008, when he was loading doors, lost his balance and twisted his back.

Claimant indicated he injured his back in a November 2008 automobile accident and in June 2009, when he was tackled by a police officer. Dr. Prostic indicated that since claimant moved to Illinois, he had another MRI on December 20, 2008. According to Dr. Prostic, the December 2008 MRI had the same findings as claimant's previous MRIs. Claimant also reported a temporary worsening of the back in July 2011, when he moved a refrigerator in his home. Dr. Prostic reviewed the medical records that were available from those incidents, including the December 2008 MRI, and testified that those incidents were temporary aggravations of claimant's back condition.

At his first deposition on December 12, 2011, Dr. Prostic opined claimed had a herniated disc at L5-S1, which was caused or contributed to by the work performed by claimant through the last date claimant worked for respondent. That opinion was based on the November 13, 2007, MRI. He then assigned claimant a 10% whole body functional impairment based upon the *Guides*.⁴ Dr. Prostic restricted claimant from lifting more than 40 pounds occasionally or 20 pounds frequently and no frequent bending or twisting at the waist. He then opined claimant could no longer perform seven of twelve job tasks identified by vocational expert Michael Dreiling, for a 58% task loss. He also testified claimant may need future medical treatment including epidural steroid injections or surgery. Dr. Prostic testified that he had no information about claimant prior to claimant's work accidents, other than what he was told by claimant.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Respondent's attorney had claimant evaluated on January 12, 2012, by Dr. Alexander S. Bailey, a board-certified orthopedic surgeon. He took a medical history from claimant, who indicated that on October 1, 2007, while loading doors he developed leg and back pain. After conservative treatment claimant returned to work and reinjured his back on March 5, 2008. Claimant also disclosed that since the 2007 and 2008 accidents, he was involved in a motor vehicle accident that caused an exacerbation of back pain. Claimant also disclosed that since the 2007 and 2008 accidents, he was tackled by a police officer, after which he developed a progression of back symptomatology. In his report dated January 12, 2012, Dr. Bailey noted claimant had prior back complaints primarily in 1999 and 2002, but they were treated conservatively. He also noted there was a relative lack of information following 2002, until 2007. Dr. Bailey's report stated he was unaware of any MRIs prior to 2008, although the November 13, 2007, MRI is discussed earlier in the report.

Dr. Bailey diagnosed claimant with a herniated disc at L5-S1 and degenerative disc disease. In his report, Dr. Bailey opined claimant did not have a significant preexisting condition and that he sustained an on-the-job work injury. He placed claimant in DRE Lumbosacral Category III and gave claimant a 10% whole body functional impairment.

After the evaluations and reports of Drs. Probst and Bailey were completed, additional medical records were discovered indicating claimant injured his back in December 2003 while wrestling with his girlfriend. The medical records were from December 30, 2003, and January 13, 2004, visits claimant made to Dr. Lisa Green at Family Christian Health Center and a January 15, 2004, MRI report from Ingalls Memorial Hospital. The MRI report indicated claimant had a lateral disc protrusion to the left of the midline at L5-S1. Dr. Bailey then prepared a second report dated January 30, 2012. The doctor was deposed on March 8, 2012.

At his deposition, Dr. Bailey testified claimant had denied treatment for his low back other than back strains. He testified that at the time he initially evaluated claimant, "Given the patient's timeline, his history and that objective MRI evidence of seeing a herniated disc, I believed without additional information that it would be reasonable to assume that the lifting of the door events resulted in the herniated disc."⁵ Dr. Bailey's opinion on causation changed after he reviewed the 2004 MRI report and reports from claimant's former personal physician, Dr. Lisa Green. Dr. Green's records indicated claimant injured his back during a December 2003 wrestling incident with his girlfriend, which resulted in the 2004 MRI being ordered. According to Dr. Bailey, the 2004 MRI findings were the same as those of the 2007 MRI. In his January 30, 2012, report the doctor stated,

I no longer feel that the patient's work environment, work condition or exposure to the work environment has a significant aggravation or causation

⁵ Bailey Depo. at 20.

correlation. I believe that his entire condition is now preexisting and a personal medical condition in nature. I do not believe his work caused nor aggravated his condition. I would therefore place the patient at a regular physical demand level as it solely and specifically is based off his purported work-related time and injury and would therefore alter my total body impairment to 0% permanent partial disability of the body as a whole as it solely and specifically relates to a purported work injury of 10/01/2007 and secondary complaint of 03/05/2008.⁶

Dr. Bailey acknowledged that despite having back problems from 1999 through the first reported accident on October 1, 2007, claimant continued to work for respondent.⁷ It was only after October 1, 2007, that claimant missed work due to back pain symptoms. The doctor confirmed claimant did not have a history that symptoms of back and leg pain bothered him between 2004 and 2007. There was nothing in claimant's medical records to indicate he was taking medication for his back during that time period. Dr. Bailey also agreed that when he conducted Waddell's testing, the results were negative.

Dr. Bailey testified claimant had no work restrictions and could complete all the job tasks identified by vocational expert Dick Santner.

A second deposition of Dr. Prostic was taken on April 2, 2012. By that time, Dr. Prostic had an opportunity to review claimant's 2004 MRI. Dr. Prostic testified that in his opinion, in 2004 claimant was at a DRE Lumbosacral Category II and likely had a functional impairment from 0% to 5%.⁸ Claimant would have a 5% impairment if he had some residual symptoms and physical findings and as low as 0% if he had none. He indicated claimant is now in DRE Lumbosacral Category III, because he has significant radicular symptoms. Dr. Prostic testified there was a difference in claimant's condition prior to his accidents at respondent and his condition after the accidents.

Dr. Prostic acknowledged there was no difference between claimant's 2004 and 2007 MRIs. Dr. Prostic testified claimant had the same back condition and the same complaints of back pain radiating into the left leg in 2004 and 2007. However, Dr. Prostic indicated claimant reported that following the 2004 MRI, he had radiculopathy only for a short period of time, which resolved. Dr. Prostic testified claimant had more extensive medical records after 2007 than after the 2004 MRI, which supported his conclusions. He also indicated that even if claimant had a back issue in 2004, he was worse off as a result of the injuries he sustained while working for respondent.

⁶ *Id.*, Ex. 5 at 2.

⁷ *Id.*, at 37-38.

⁸ Prostic Depo. (Apr. 2, 2012) at 5-6.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”¹⁰

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹¹

The Board agrees with the finding of ALJ Hursh that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. Immediately following the October 1, 2007, and March 5, 2008, accidents, claimant reported them to his supervisor. Claimant testified that on both occasions, he felt an immediate onset of back pain after handling doors and twisting his back. Both accidents occurred at work while claimant was performing his regular job duties. Admittedly, claimant was examined extensively about the repetitiveness and physical demands of his job. However, little testimony was elicited from claimant that indicated that his injuries resulted from his repetitive work activities. Simply put, the preponderance of the evidence supports a finding that claimant sustained personal injuries arising out of and in the course of his employment with respondent as the result of accidents on October 1, 2007, and March 5, 2008, and the injuries were not the result of a series of repetitive accidents.

The next issue is whether claimant sustained a permanent functional impairment as a result of his two accidents and resulting injuries. Following his 2007 accident claimant returned to his normal job duties. He was given no functional impairment or permanent work restrictions. Therefore, claimant is not entitled to permanent partial disability benefits as the result of his October 1, 2007, accident.

Dr. Prostic’s assessment that claimant sustained a 5% functional impairment as a result of the 2003 wrestling incident which increased to 10% after the 2008 accident is more credible. Dr. Bailey’s opinion is based on the premise that claimant’s impairment did not increase following the 2007 and 2008 accidents because there was no change on the

⁹ K.S.A. 2007 Supp. 44-501(a).

¹⁰ K.S.A. 2007 Supp. 44-508(g).

¹¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

2007 MRI report from the 2004 MRI report. Dr. Bailey did not find it significant that after the 2004 MRI, claimant missed no work as the result of back symptoms until after the October 1, 2007, accident. As pointed out by ALJ Hursh, K.S.A. 2007 Supp. 44-508(e) does not require that a lesion or change in the physical structure of the body present external or visible signs of its existence.

The Board finds claimant sustained a 5% permanent functional impairment following the 2003 wrestling incident that increased to 10% following his 2008 accident. In other words, as a result of his 2008 accident, claimant sustained an additional 5% permanent whole body impairment. Respondent relies on the fact that claimant's 2004 and 2007 MRIs revealed a disc protrusion. However, claimant continued working following the 2003 wrestling incident that gave rise to the 2004 MRI. Claimant testified that the radiculopathy that resulted from the 2003 incident dissipated and he received no treatment for his low back following the 2004 MRI.

The Board affirms ALJ Hursh on the issue of wage loss. Claimant did not work from June 28, 2008, through February 27, 2011. Therefore, during that time period claimant sustained a 100% wage loss. The parties stipulated claimant's average weekly wage inclusive of fringe benefits was \$1,445.56. Claimant testified that beginning February 28, 2011, he earned \$14.50 per hour for 40 hours a week and one hour each week of overtime, for a post-injury average weekly wage of \$601.75. Consequently, beginning February 28, 2011, claimant sustained a 58% wage loss.

ALJ Hursh found claimant failed to prove any task loss. The Board disagrees. In his first deposition Dr. Prostic opined claimant's 10% functional impairment was caused by his work-related accidents and that claimant had a 58% task loss. At his second deposition, Dr. Prostic was asked if his opinions on claimant's restrictions and task loss had changed. Dr. Prostic testified his opinions concerning claimant's restrictions and task loss were based on the work-related injuries sustained by claimant in 2007 and 2008. He indicated that as a result of the 2003 wrestling incident, claimant had not lost his ability to perform any job tasks. The Board adopts Dr. Prostic's opinions on task loss.

The Board discounts Dr. Bailey's opinion that claimant sustained no task loss as it is predicated on his opinion claimant suffered no permanent impairment as a result of the 2008 work-related injuries.

Some credence must be given to the testimony of claimant. Claimant testified that following the 2003 wrestling incident, his radiculopathy went away and he did not miss work until after the October 2007 accident. Following the 2003 wrestling incident that resulted in a back injury, claimant was not given restrictions by a physician. Therefore, claimant's 2003 wrestling injury, and any resulting functional impairment, did not contribute to claimant's work disability.

Claimant did not contest the ALJ granting a credit for the 5% functional impairment that Dr. Prostic opined resulted from the 2003 wrestling incident. Consequently, respondent is entitled to a 5% credit pursuant to K.S.A. 2007 Supp. 44-501(c).

In his Award ALJ Hursh indicated that he was not granting claimant's request that respondent pay medical expenses incurred at Mission Diagnostic Health as no evidence concerning those expenses was presented. Claimant did not raise this as an issue in his amended application for review or brief to the Board, nor at oral argument. Therefore, the Board will not consider that as an issue.

CONCLUSION

1. Claimant sustained personal injury arising out of and in the course of his employment that resulted from claimant's October 1, 2007, and March 5, 2008, accidents. Claimant's injuries were the result of two single traumatic accidents, not a series of repetitive accidents.

2. Claimant had a preexisting 5% whole body functional impairment as the result of a lumbosacral injury. Therefore, respondent is given a 5% credit pursuant to K.S.A. 2007 Supp. 44-501(c).

3. Claimant failed to prove by a preponderance of the evidence that his October 1, 2007, accident resulted in a functional impairment or work disability. Claimant is entitled to be reimbursed reasonable and related medical expenses for that accident plus unauthorized medical up to the \$500 statutory maximum.

4. Claimant sustained an additional 5% whole body functional impairment as a result of his March 5, 2008, accident.

5. From June 28, 2008, through February 27, 2011, claimant sustained a 100% wage loss and a 58% task loss for a 79% work disability. Respondent is given a 5% credit pursuant to K.S.A. 2007 Supp. 44-501(c) because of claimant's preexisting functional impairment. Therefore, claimant is entitled to permanent partial disability benefits for a 74% work disability during the aforementioned period of time.¹²

6. From February 28, 2011, thereon, claimant sustained a 58% wage loss and a 58% task loss for a 58% work disability. Respondent is given a 5% credit pursuant to K.S.A. 2007 Supp. 44-501(c) because of claimant's preexisting functional impairment. Therefore, claimant is entitled to permanent partial disability benefits for a 53% work disability during the aforementioned period of time.

¹² See *Von Kessler v. Multi Chem Group*, No. 1,034,895, 2009 WL 3710741 (Kan. WCAB Oct. 28, 2009).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the May 17, 2012, Award entered by ALJ Hursh as follows:

For the October 1, 2007, accident, claimant is awarded only past authorized and unauthorized medical expenses from respondent.

Billy Wardell is granted compensation from General Motors Corporation for a March 5, 2008, accident and resulting disability. Based upon an average weekly wage of \$1,445.56, Mr. Wardell is entitled to receive the following disability benefits:

For the period ending June 27, 2008, Mr. Wardell is entitled to receive 16.29 weeks of permanent partial general disability benefits at \$510.00 per week, or \$8,307.90, for a 5% permanent partial general disability.

For the period from June 28, 2008, through February 27, 2011, Mr. Wardell is entitled to receive 139.29 weeks of permanent partial general disability benefits at \$510.00 per week, or \$71,037.90, for a 74% permanent partial general disability.¹⁴

Beginning February 28, 2011, Mr. Wardell is entitled to receive 40.50 weeks of permanent partial general disability benefits at \$510.00 per week, or \$20,654.20, for a 53% permanent partial general disability.¹⁵ The total award is not to exceed \$100,000.00, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

¹³ K.S.A. 2011 Supp. 44-555c(k).

¹⁴ Claimant's 79% permanent partial general disability was reduced by 5% for the credit pursuant to K.S.A. 2007 Supp. 44-501(c).

¹⁵ Claimant's 58% permanent partial general disability was reduced by 5% for the credit pursuant to K.S.A. 2007 Supp. 44-501(c).

Dated this ____ day of December, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge